Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 89-882

In The

Supreme Court of the United States

October Term, 1989

CLARKE COUNTY SCHOOL DISTRICT,

Petitioner,

vs.

IN RE: DREW P. by next friend,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

B. ANDREW PRINCE
(next friend of Drew P.)
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Respondent

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QUESTION PRESENTED

Does the Education for all Handicapped Children Act, 20 U.S.C. Sec. 1401 *et seq.*, require that a unilaterally selected private educational placement be a "free appropriate public education" in order for the parents of the handicapped child to be entitled to reimbursement for expenses.

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I.

STATUTORY PROVISIONS INVOLVED

(Note: The following are in addition to those STATUTORY PROVISIONS set out in the Petition.)

34 CFR Sec. 300.1 (1988): Purpose.

The purpose of this part is:

(a) To insure that all handicapped children have available to them a free appropriate public education which includes special education and related services to meet their unique needs.

34 CFR Sec. 300.2(c) (1988): Private schools and facilities. Each public agency in the State is responsible for insuring that the rights and protections under this part are given to children referred to or placed in private schools and facilities by that public agency.

34 CFR Sec. 300.4 (1988): Free appropriate public education. As used in this part, the term "free appropriate public education" means special education and related services which:

(a) Are provided at public expense, under public supervision and direction, and without charge,

(b) Meet the standards of the State educational agency, including the requirements of this part,

(c) Include preschool, elementary school, or secondary school education in the State involved, and

(d) Are provided in conformity with an individualized education program which meets the requirements under Sec. 300.340-300.349 of Subpart C.

34 CFR Sec. 300.341(b)(1) (1988): State education agency responsibility.

(b) Private schools and facilities. The State educational agency shall insure that an individualized education program is developed and implemented for each handicapped child who:

(1) Is placed in or referred to a private school or facility by a public agency;

34 CFR Sec. 300.347(a) (1988): Private school placements.

(a) Developing individualized education programs. (1) Before a public agency places a handicapped child in, or refers a child to, a private school or facility, the agency shall initiate and conduct a meeting to develop an individualized education program for the child in accordance with Sec. 300.343.

34 CFR Sec. 300.400 (1988): Applicability of Sec. 300.401-300.403.

Sections 300.401-300.403 apply only to handicapped children who are or have been placed in or referred to a private school or facility by a public agency as a means of providing special education and related services.

34 CFR Sec. 300.401 (1988): Responsibility of State educational agency.

Each State educational agency shall insure that a handicapped child who is placed in or referred to a private school or facility by a public agency:

(a) Is provided special education and related services:

(1) In conformance with an individualized education program which meets the requirements under Sec. 300.340-300.349 of Subpart C;

(2) At no cost to the parents; and

(3) At a school or facility which meets the standards that apply to State and local educational agencies (including the requirements in this part); and

(b) Has all of the rights of a handicapped child who is served by a public agency.

34 CFR Sec. 300.403 (1988): Placement of children by parents.

(a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under Sec. 300.450-300.460.

(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures under Sec. 300.500-300.514 of Subpart E.

S. Rep. No. 94-168, p. 32 (1972): Furthermore, the Committee bill stipulates that special education and related services should be available to all children within the State as a matter of public responsibility. Thus, the bill requires that if a State or local educational agency has

placed or referred the child to a private school or to another school or facility inside or outside of the State or local jurisdiction because the State or local educational agency did not have an appropriate program for the child, then the State or local educational agency remains financially responsible for that child's education. The Committee points out that all provisions of the Act including those requiring due process protections, the provision of individualized planning conferences, and the provision of services in the least restrictive environment extend to children so served by a State or local educational agency. If a parent contends that he or she has been forced, at that parent's own expense, to seek private schooling for the child because an appropriate program does not exist within the local educational agency responsible for the child's education and the local educational agency disagrees, that disagreement and the question of who remains financially responsible is a matter to which the due process procedures established under section 614 (5) applies.

II

STATEMENT OF THE CASE

Respondent brought suit as next friend of his handicapped child, alleging that the Petitioner had failed to provide a free appropriate public education to the child, and sought a determination that only a residential placement in an autistic treatment facility would provide the

child with an appropriate education and seeking reimbursement for monies expended by Respondent in unilaterally having placed the child in such a private placement.

The evidence disclosed that prior to the child being unilaterally removed from the placement offered by Petitioner, he had become self destructive and was a danger not only to himself but to others. There had existed, for some years, a disagreement between the parents and the petitioner as to whether the child's disabling condition was retardation or autism. Since the Petitioner had maintained that the child was retarded and could be appropriately educated in its program for retarded children and since Respondent was aware of the financial risk involved, Respondent initially placed the child in an in-state residential facility for retarded persons. After a short period in this facility, Respondent was advised that the personnel there did not think the placement appropriate, since their opinion was that the child was autistic, and they recommended residential placement in an autistic treatment facility. The District Court, likewise, found this placement inappropriate and awarded no reimbursement for expenses connected therewith.

After a lengthy search, Respondent finally located a facility that would accept the child and which was a facility for the treatment of autistic children. There was no such facility within the state of Georgia, nor was there any such facility, that would or could accept the child, available at the time within the continental United States. The Petitioner did nothing by way of recommending residential programs, meeting state standards or otherwise. The placement chosen by Respondent was not only

the only one available and appropriate at that time, but was one where the costs involved were substantially less than the costs of other residential placements, even though none of those other placements could or would accept the child.

Neither the Petitioner, nor the Respondent, presented evidence to, nor was the issues of "state standards" presented for consideration to the District Court. Petitioner first raised this issue in its appeal from the adverse decision.

III

REASONS FOR NOT GRANTING THE WRIT

A.) Question Presented Was Not Raised or Resolved in the District Court.

The question presented by Petitioner, regarding state standards and whether the placement for which reimbursement was ordered meet such standards or whether there were any such standards, was not raised before the District Court and this Court should not now entertain such issue.

"Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim vs. Miller*, 96 S. Ct. 1399 (1976). The general rule is that an appellate court does not consider an issue not passed on below. *Singleton vs. Wulff*, 96 S. Ct. 2868 (1976). Issues not raised in the district court cannot be considered by the appellate courts as a basis for reversal. *Morrow vs. Greyhound Lines Inc.*, 541 F.2d 713 (1976).

B.) Question Presented Does Not Meet the Standard For The Grant of The Writ.

1.) Petitioner has erroneously interpreted the Education For All Handicapped Children Act, 20 U.S.C. Sec. 1401 *et seq.*

Petitioner implies that before reimbursement for private placement by the parents of a handicapped child can be ordered, the parents must prove that such a placement is "a free appropriate public education" as defined by the Education for All Handicapped Children Act, 20 U.S.C. Sec. 1401 *et seq.* (EHA).

As Petitioner concedes, "it cannot be seriously argued that reimbursement of parents for sums spent on private special education is not authorized under the EHA." (Petition p. 9). Petitioner contends, however, that before such reimbursement can be ordered, the parents must show that the private special education placement meets the standard of "a free appropriate public education", as defined by the EHA. They imply that the only remedy available "under the Act" is a "free appropriate public education". Neither the legislative history, nor the EHA, nor the regulations promulgated thereunder indicate such a result.

The legislative history indicated that Congress contemplated this very factual situation and provided in the EHA "that disagreement and the question of who remains financially responsible is a matter to which the due process procedures . . . " apply. S. Rep. No. 94-168, p. 32 (1975).

There is no doubt but that the regulations deal with this very situation. Not only do they provide that their purpose is to provide that each handicapped child *"referred to or placed in private schools and facilities by"* a *"public agency"*, has a *"free appropriate public education"* (34 CFR Sec. 300.2(2) and Sec. 300.1(a), they provide that in regards to such a placement, i.e. *by a public agency*, the placement must meet the definition of "free appropriate public education". 34 CFR Sec. 300.4.

Also, the regulations provide that the requirement of an individualized education program (I.E.P.) as required by the definition of "a free appropriate public education", are applicable only when a child *"Is placed in or referred to a private school or facility by a public agency;"* and that an I.E.P. is only required before *"a public agency places a handicapped child in, or refers a child to, a private school or facility"* (34 CFR, Sec. 300.341(b)(1) and Sec. 300.347(a)).

Likewise, the regulations provide that the requirement that a private school or facility meet "the standards that apply to State and legal educational agencies" (34 CFR Sec. 300.401(3)). " . . . apply only to handicapped children who are or have been placed in or referred to a private school or facility by a *public agency* . . . " (34 CFR Sec. 300.400).

The regulations specifically deal with the factual situation in this case when they provide that "Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures . . . " (34 CFR Sec. 300.403(b)). It is of importance to note the glaring lack of the phrase

"free appropriate public education", in this regulation and likewise in paragraph 2 of S. Rep. No. 94-168, p. 32 (1975).

The cases relied upon and cited by Petitioner can be reconciled with this case, since they generally deal with placements by a public agency or placement where the availability of other placements has not by either party been addressed.

2.) Petitioner has erroneously interpreted the judicial decision regarding the EHA.

This Court in *Burlington School Comm. v. Mass. Dept. of Ed.*, 471 U.S. 359. (1985), found that a handicapped child is entitled "to receive at public expenses specially designed instruction to meet his unique needs . . . " (*Burlington* at p. 361) and that forcing parents to leave a child in an "inappropriate placement" would violate the requirements of the EHA (*Burlington* at p. 360).

Such a *post hoc* determination of financial responsibility, as the District Court undertook in this case, was specifically authorized in *Burlington* (at p. 371). This Court recognized that the intent of the law was to give each handicapped child both an appropriate and free education, (*Burlington* at 372). Respondent submits that if *Burlington* has meaning the Petitioner's position cannot be sustained. If the only remedy available is for parents to unilaterally and at their expense to provide a placement that (1) has been provided at public expense, under public supervision and direction, and without charge, (2) meets the standards of the state educational agency, (3) includes an appropriate preschool, elementary, secondary

school *in* the State involved, and (4) are provided in conformity with the individualized education program, then this burden can never be met.

First a unilateral placement is never at public expense, as recognized in *Burlington*. Secondly, such a placement may or may not meet state standards. In this case, the issue of state standards, whether they existed and, if so, were meaningful or not was not addressed at the District Court level. As Respondent submitted to the Eleventh Circuit in response to Petitioner first raising the issue on state standards, Petitioner, through counsel, acknowledged on the record, in the District Court, as opposed to a mere allegation in Respondent's brief in the Eleventh Circuit, that the State of Georgia, and this Petitioner, does not even recognize autism as a separate disorder (R4-19; Respondent's Brief p. 18, Eleventh Circuit). It is not difficult to comprehend the logic used by Petitioner.

"If we don't recognize this particular handicapping condition, then we won't establish any state standards regarding private placement of children with this condition and thus will not have to pay reimbursement to parents who place their children privately". When one considers that the reason for private placement was, in the first instance, required since the public school placement was determined to be inappropriate because of the same failure to recognize autism and treat it accordingly, the fallacy of Petitioner's logic becomes obvious.

Thirdly, any out of state placement, would be precluded by the requirement of "*in* the State involved" in the definition of "free appropriate public education".

Likewise, there would never by an individualized education program, as contemplated and defined by the EHA, in an unilateral placement. Such a program is, by definition, required to be done by the local education agency, with parental input. In a unilateral placement, as in this case and as in *Burlington*, this could never be the case.

To hold that the EHA requires a parent to place a child privately only in a "state approved" school assumes that, as of the enactment of the EHA, every state had an approved private placement available for every handicapping condition. This was not, and is not, the case. The error of this assumption was pointedly acknowledged in *Hendrick Hudson Dist. Bd. of Ed. vs. Rowley*, 458 U.S. 176 (1981), at 191. Such an assumption would require finding that each state had an approved private school for each handicapped child in the wide spectrum of handicapped children and with all the infinite variations involved. (*Rowley* at 202).

IV

CONCLUSION

Respondent submits that this Court has no basis for the granting of the writ; that the decision below is in accord with the statutory authority and the judicial decisions of this and other courts and that no other reason exists for this Court to entertain such Petition.

Respectfully Submitted,

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